

A INTER HERITAGE (M) SDN BHD

v.

ASA SPORTS SDN BHD

B COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
LOW HOP BING JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: W-02-642-2001]
C 18 NOVEMBER 2008

***CIVIL PROCEDURE:** Injunction - Ex parte injunction - Setting aside, appeal against - Whether trial judge correct in rejecting affidavit in support of application for injunction - Right of hearing - Whether damages an adequate remedy - Whether injunction correctly set aside - Rules of the High Court 1980, O. 41 r. 9(1), (2), 10(2), O. 52 r. 2(1)*

***CIVIL PROCEDURE:** Affidavits - In support of application for injunction - Statutory requirements - Whether complied with - Whether trial judge correct in rejecting affidavit - Rules of the High Court 1980, O. 41 r. 9(1), (2), 10(2)*

***CIVIL PROCEDURE:** Injunction - Setting aside - Right of hearing - Contempt of court - Leave to commence committal proceedings - Whether obtained - Rules of the High Court 1980, O. 52 r. 2(1)*

This was an appeal by the plaintiff against the decision of the High Court setting aside an *ex parte* injunction obtained by the plaintiff, with costs and damages to be assessed. The plaintiff, the registered and beneficial owner of the land on which an international five-star hotel was erected, entered into a tenancy agreement with the defendant for the use of part of the hotel by the defendant for the operation of a nightclub. Upon the defendant's purported termination of the agreement, the defendant's representatives proceeded to remove various items from the nightclub, which the plaintiff alleged was in breach of the agreement. The plaintiff requested the defendant to return the items that had been removed from the premises and to recommence operations. When the plaintiff received information

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that the defendant was intending to hold an auction of the items at the premises, it obtained an injunction to prevent, *inter alia*, the auction. The injunction was subsequently set aside, resulting in the present appeal. The plaintiff submitted that the judge had erred: (i) in rejecting the affidavit of one Talash Kumar Rathod ('Rathod's affidavit'), which was annexed to the affidavit of one Ahmad Zenur Majid; and (ii) in giving the defendant the right of hearing when the defendant was in contempt of court by wilfully disobeying the injunction.

Held (dismissing the appeal)

Per Low Hop Bing JCA delivering the judgment of the court:

- (1) On the facts, Rathod's affidavit had neither been filed in the High Court as required by O. 41 r. 9(1) Rules of the High Court 1980 ('RHC') nor was it endorsed as required by O. 41 r. 9(2) RHC. Further, Rathod's affidavit had not been stamped with the appropriate fee, which obviously meant that it could not be used in any proceedings as it had also run afoul of O. 41 r. 10(2) RHC. In the circumstances, the judge was correct in rejecting Rathod's affidavit. (paras 19 & 20)
- (2) The rule that a party wilfully disobeying or contravening a court order cannot be heard is only applicable in cases where that party is *prima facie* in contempt for which the court has granted leave for committal proceedings to be instituted, but not *eg*, where the plaintiff has not even reached the threshold stage for leave as prescribed in O. 52 r. 2(1) RHC. In the instant appeal, since the plaintiff had not obtained leave to commence committal proceedings against the defendant, the judge was correct in giving the defendant the right of hearing in relation to the defendant's application to set aside the injunction. (para 33)
- (3) The instant appeal arose from a dispute pertaining to a tenancy agreement for the operation of a nightclub, the breach of which would at most give rise to quantifiable damages as an adequate and proper remedy. It is trite law that an injunction would not be granted in such cases. (para 42)

- A (4) For the reasons given above, the High Court had correctly considered, in accordance with established judicial principles, the facts and circumstances in the exercise of discretion in setting aside the injunction. There were no merits in the instant appeal. (para 43)

B ***Bahasa Malaysia Translation Of Headnotes***

C Ini ialah rayuan oleh plaintiff terhadap keputusan Mahkamah Tinggi mengenepikan sesuatu injunksi *ex parte* yang diperolehi oleh plaintiff, dengan kos dan ganti rugi untuk ditaksirkan. Plaintiff, pemilik berdaftar dan benefisial sebidang tanah di atas mana sebuah hotel antarabangsa lima bintang telah didirikan, membuat sesuatu perjanjian penyewaan dengan defendan bagi penggunaan sebahagian hotel oleh defendan untuk operasi sebuah kelab malam. Apabila defendan berupa menamatkan perjanjian itu, wakil defendan mula mengeluarkan beberapa item-item dari kelab malam itu, yang mana plaintiff mengatakan merupakan pelanggaran perjanjian itu. Plaintiff meminta defendan mengembalikan item-item yang telah dikeluarkan dari premis itu dan untuk memulakan kembali operasi. Apabila plaintiff menerima maklumat bahawa defendan ingin mengadakan sebuah lelong item-item di premis itu, ia memperolehi sesuatu injunksi untuk menghalang, antara lain, lelong itu. Plaintiff menghujah bahawa hakim telah khilaf: (i) dalam menolak affidavit seorang yang bernama Talash Kumar Rathod ('afidavit Rathod'), yang telah dilampir bersama dengan affidavit seorang yang bernama Ahmad Zenur Majid; dan (ii) dalam memberikan hak pembicaraan kepada defendan apabila defendan menghina mahkamah dengan tidak mematuhi injunksi itu.

E **Diputuskan (menolak rayuan)**
F **Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:**

- (1) Atas fakta, affidavit Rathod tidak pernah difail dalam Mahkamah Tinggi seperti yang diperlukan oleh A. 41 k. 9(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') ataupun diendors seperti yang diperlukan oleh A. 41 k. 9(2) KMT. Lagipun, affidavit Rathod tidak ditera dengan fee yang berpatutan, yang jelasnya bermaksud bahawa ia tidak boleh digunakan dalam mana-mana prosiding kerana ia juga melanggar A. 41 k. 10(2) KMT. Dalam halkeadaan begini, hakim membuat keputusan yang betul dalam menolak affidavit Rathod.

- (2) Rukun bahawa sesuatu pihak yang tidak mengikut atau tidak mematuhi dengan sengaja satu perintah mahkamah hanya boleh digunakan dalam kes-kes di mana pihak itu *prima facie* dalam penghinaan untuk mana mahkamah telah beri kebenaran bagi prosiding komital dimulakan, tetapi bukan, contohnya, di mana plaintif tidak lagi sampai ke peringkat ambang untuk kebenaran diberi seperti yang diperuntukkan dalam A. 52 r. 2(1) KMT. Dalam rayuan ini, oleh kerana plaintif tidak memperoleh kebenaran untuk memulakan prosiding komital terhadap defendan, hakim membuat keputusan yang betul dalam memberikan defendan hak pembicaraan berhubungan dengan permohonan defendan untuk mengenenpikan injunksi itu. A
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- (3) Rayuan ini berbangkit dari sesuatu pertikaian mengenai satu perjanjian penyewaan untuk operasi sebuah kelab malam, di mana suatu pelanggaran akan, paling banyak, membangkitkan ganti rugi yang boleh dinyatakan kuantitinya sebagai remedi yang mencukupi dan betul. Ia merupakan undang-undang mantap bahawa sesuatu injunksi tidak akan dibenarkan dalam kes-kes sebegini. D
- (4) Untuk sebab-sebab yang dinyatakan di atas, Mahkamah Tinggi telah mempertimbangkan dengan betul, mengikuti prinsip-prinsip kehakiman yang mantap, fakta dan keadaan dalam penggunaan budi bicara untuk mengenenpikan injunksi itu. Rayuan ini langsung tidak ada merit. E
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Case(s) referred to:

- Arumugam v. Suppiah Chettiar* [1935] 1 LNS 43 HC (*refd*)
- Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor* [1990] 2 CLJ 157; [1990] 1 CLJ (Rep) 30 SC (*refd*)
- Datuk Hong Kim Sui v. Tiu Shi Kian & Anor & Another Case* [1985] 1 CLJ 39; [1985] CLJ (Rep) 101 FC (*refd*) G
- Gibb & Co v. Malaysia Building Society Bhd* [1982] CLJ 185; [1982] CLJ (Rep) 99 FC (*refd*)
- Hadkinson v. Hadkinson* [1952] 2 All ER 567 CA (*refd*)
- Iberian Trust Ltd v. Founders Trust And Investment Co Ltd* [1968] 2 QB 913 (*refd*) H
- London & Blackwell Railway Co v. Cross* [1886] 3 Ch D 354 (*refd*)
- Mah Siew Keong v. Bayu Gamitan Sdn Bhd and Other Appeals* [2002] 1 CLJ 695 CA (*refd*)
- Messrs Hisham, Sobri & Kadir; Advocates & Solicitors v. Kedah Utara Development Sdn Bhd & Anor* [1988] 1 CLJ 627; [1988] 2 CLJ (Rep) 5 HC (*refd*) I

- A *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1978] 1 LNS 184 FC
(*refd*)
The Vanda [1960] 1 LNS 45 (*refd*)
Tinta Press Sdn Bhd v. Bank Islam (M) Bhd [1987] 1 CLJ 447; [1987]
CLJ (Rep) 396 SC (*refd*)
- B *Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok* [1975] 1
LNS 190 HC (*refd*)
Wilson & Whitworth Ltd v. Express & Independent Newspapers Ltd [1969] 1
WLR 197 (*refd*)

Legislation referred to:

- C Rules of the High Court 1980, O. 41 rr. 5(1), (2), 9(1), (2), 10(2),
O. 45 r. 7(3), (4), O. 52 r. 2(1)

For the appellant - Hj Sulaiman Abdullah; M/s Zain & Co

For the respondent - Dato' M Pathmanathan; M/s Kumar Partnership

- D [Appeal from High Court, Kuala Lumpur; Suit No: S5-22-557-2001]
*[Editor's note: Please refer to Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn
Bhd (No 1) [2001] 8 CLJ 300.]*

Reported by Suresh Nathan

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JUDGMENT

Low Hop Bing JCA:

- F **Appeal**

- G [1] This is the plaintiff's appeal against the decision of the
Kuala Lumpur High Court in setting aside the *ex parte* injunction
("the injunction") obtained by the plaintiff, with costs and
damages to be assessed.

[2] We have unanimously dismissed the plaintiff's appeal. We
now give our grounds.

- H **Factual Background**

- I [3] The plaintiff is the registered and beneficial owner of the
land on which an international five-star hotel, Sheraton Imperial
Kuala Lumpur ("the hotel"), was erected.
- [4] By tenancy agreement made on 17 May 2000 between the
plaintiff and the defendant ("the agreement"), the plaintiff let to
the defendant part of the hotel for the operation and management
of a nightclub and entertainment facility known as Riva's ("the

nightclub”), in consideration of an agreed monthly rental and the defendant’s completion of the construction works on the demised premises, in accordance with the building plans, drawings and specifications prepared by the defendant and approved by the plaintiff.

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[5] On several occasions in December 2000, and subsequently *vide* letter dated 4 May 2001, the defendant informed the plaintiff that since its inception, the nightclub had not been doing well and requested for a reduction in rental. The plaintiff could not accede to the defendant’s request.

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[6] On or about 23 June 2001, the defendant purported to terminate the agreement on the ground that the plaintiff had not produced a valid temporary certificate of occupation (“the TCO”) on or by 22 June 2001. The plaintiff only procured the TCO three days later ie on 25 June 2001, although it was dated to run from 21 June 2001.

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[7] On 26 and 27 June 2001, defendant’s representatives arrived at the premises with trucks, and removed various items therefrom despite protests by the plaintiff and the plaintiff’s solicitors. The plaintiff alleged that the removal was in breach of the agreement between the parties that the defendant’s trade fixtures, fittings, plant, machinery and equipment would devolve upon the plaintiff lock, stock and barrel upon termination of the agreement.

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[8] The defendant *vide* solicitors’ letter dated 22 June 2001 informed the plaintiff that by 23 June 2001, the defendant would be releasing the keys to the premises, after removing its belongings therefrom. The plaintiff’s solicitors wrote to the defendant on 27 June 2001 requesting the defendant to return the items that had been removed from the premises and to recommence operation.

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[9] When the plaintiff received information that the defendant was intending to hold an auction of the items at the premises on 28 June 2001, the plaintiff’s solicitors obtained the injunction on the same day to prevent, *inter alia*, the auction.

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[10] The injunction was subsequently set aside.

[11] Hence, this appeal by the plaintiff.

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A Affidavit Annexed To Affidavit

[12] Haji Sulaiman bin Abdullah, learned counsel for the plaintiff, said that the learned judge had erred in rejecting the affidavit of one Talash Kumar Rathod (“Rathod’s affidavit”), annexed to the affidavit of one Ahmad Zenur bin Majid. The plaintiff relied on, *inter alia*, O. 41 r. 5(1) and (2) of the Rules of the High Court 1980.

(A reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980).

[13] The response of defendant’s learned counsel Dato’ M. Pathmanathan was that Rathod’s affidavit should be rejected as it had not been properly stamped and filed under O. 41 r. 9(1) and (2) and is not an affidavit under O. 41 r. 10(2).

[14] The learned judge sustained the defendant’s submission.

[15] In our judgment, the question that merits determination under this head is whether the learned judge is correct in rejecting Rathod’s affidavit.

[16] Order 41 r. 5 relied on by the plaintiff is apparently of no assistance to the plaintiff. It reads as follows:

5. (1) Subject to O. 14 r. 2(2) and 4(2), to para (2) of this rule and to any order made under O. 38 r. 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

(2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

[17] As a general rule, O. 41 r. 5(1) regulates the contents of an affidavit *viz* only such facts as the deponent is able of his own knowledge to prove. As an exception, O. 41 r. 5(2) allows an affidavit, sworn for the purpose of being used in interlocutory proceedings, to contain statements of information or belief with the sources and grounds thereof.

[18] In both the situations under O. 41 r. 5(1) and (2), the affidavit in question must first comply with the relevant rules such as O. 41 r. 9(1), (2); and r. 10(2). The affidavit must be properly

brought before the court. Specifically, under O. 41 r. 9(1), every affidavit must be filed in the registry. In addition, O. 41 r. 9(2) requires every affidavit to be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filling, and an affidavit which is not so indorsed may not be filed or used without leave of the court. Rathod's affidavit has neither been filed in the High Court as required by O. 41 r. 9(1), nor was it indorsed as required by O. 41 r. 9(2).

[19] It needs to be noted that Rathod's affidavit had not been stamped with the appropriate fee. Obviously Rathod's affidavit cannot be used in any proceedings, as it has also run foul of O. 41 r. 10(2) which reads as follows:

(2) An original affidavit may not be used in any proceedings unless it has previously been stamped with the appropriate fee.

[20] In the circumstances, we hold that the learned judge is correct in rejecting Rathod's affidavit.

Defendant's Right Of Hearing

[21] The plaintiff complained that the learned judge had erred in giving the defendant the right of hearing when the defendant was in contempt of court by wilfully disobeying the injunction which was allegedly served on the defendant's solicitors and/or the defendant. The plaintiff relied on, *inter alia*:

- (1) *Hadkinson v. Hadkinson* [1952] 2 All ER 567 CA; and
- (2) *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor & Another Case* [1985] 1 CLJ 39; [1985] CLJ (Rep) 101 FC.

[22] The defendant contended that the defendant was not in contempt as:

- (1) The injunction has not been served on the defendant;
- (2) The terms of the injunction are contradictory; and
- (3) There was no proper penal endorsement.

[23] The learned judge upheld the stand taken for the defendant.

A [24] In our judgment, service of the injunction is a condition precedent to enforcement thereof.

B [25] The enforcement of an order requiring a body corporate, such as the defendant, to do or abstain from doing an act must first comply with O. 45 r. 7(3) which provides as follows:

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(ii) or (iii) unless:

C (a) a copy of the order has also been served personally on the officer ... against whom an order of committal is sought; and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

D [26] It is significant to note that the letter dated 13 July 2001, issued by the plaintiff's solicitors to the defendant's solicitors, had informed the defendant's solicitors "that your client had attempted to evade service of the *ex parte* order." This shows that the injunction had not been served on the defendant. There is also no affidavit to the effect that the injunction had been duly served on the defendant. That being the case, the defendant could not be said to have wilfully disobeyed or contravened the injunction, and so no contempt liability can arise therefrom: see in *Hadkinson, supra* and *Datuk Hong Kim Sui, supra*.

F [27] We would now place the terms of the injunction in proper perspective:

G (1) Para (a) thereof restrains the defendant whether by itself or its officers, employees, agents, servants or otherwise, from removing any trade fixtures, fittings, plant, machinery, equipment and other items on the premises "seperti yang didefinisikan di bawah" ("as defined below"). Although para (a) had incorporated the words "seperti yang didefinisikan di bawah", the injunction had apparently failed to define or particularize the items;

H (2) Para (b) thereof, which refers to cl. 6A.1 of the agreement, is mandatory in nature, as it compels the return by the defendant to the premises of all the goods which the defendant had allegedly removed prior to the injunction.

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Compliance with para (b) would require the defendant to enter the premises which would run counter to para (c) which in turn restrains the defendant from entering the premises. In view of the contradiction in terms, the defendant was in a quandary as to the manner of compliance because returning the goods could expose the defendant to contempt.

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[28] Since non-compliance with or wilful disobedience to an injunction would attract committal proceedings, the plaintiff being the party seeking to enforce it must ensure that the terms thereof are clear and unambiguous in order to facilitate compliance by the defendant. A courteous reminder is contained in the following passage:

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It is of great importance, especially in cases where the parties are likely to be in controversy and make difficulties, and perhaps to be contumacious and hostile, that orders which may have to be enforced by proceedings for committal or attachment should be of a perfectly precise nature, so that there can be no controversy about the duty which has to be performed under them. (per Lord Greene MR in *Gordon v. Gordon* (1946) P99, 102).

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[29] An injunction which is vague and ambiguous is unenforceable. see eg, *Iberian Trust Ltd v. Founders Trust And Investment Co Ltd* [1968] 2 QB 913; *Wilson & Whitworth Ltd v. Express & Independent Newspapers Ltd* [1969] 1 WLR 197; and *Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 1 CLJ 695.

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[30] Next, the procedural law requiring appropriate penal endorsement on an injunction is housed in O. 45 r. 7(4) which reads as follows:

(4) There must be indorsed on the copy of an order served under this rule a notice in Form 87 informing the person on whom the copy is served:

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(a) In the case of service under para. (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

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(b) In the case of service under para (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

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- A [31] Where the body corporate or the alleged contemnor is not served with the order bearing the appropriate penal endorsement, as required under O. 45 r. 7(4), the application for committal was fatally flawed: See eg, *Messrs Hisham, Sobri & Kadir; Advocates & Solicitors v. Kedah Utara Development Sdn Bhd & Anor* [1988] 1 CLJ 627; [1988] 2 CLJ (Rep) 5 and *Arumugam v. Suppiah Chettiar* [1935] 1 LNS 43; and *The Vanda* [1960] 1 LNS 45.
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- C [32] A proper perusal of the injunction reveals that the penal endorsement was not signed by the registrar, did not specify the time for compliance and was not directed at any person or officer of the defendant. In the circumstances, O. 45 r. 7(4) has not been complied with. No contempt liability can arise therefrom.

- D [33] The rule, that a party wilfully disobeying or contravening a court order cannot be heard is only applicable in cases where that party is *prima facie* in contempt for which the court has granted leave for committal proceedings to be instituted, but not eg, where the plaintiff has not even reached the threshold stage for leave as prescribed in O. 52 r. 2(1).

- E [34] In the instant appeal, as the plaintiff has not obtained leave to commence committal proceedings against the defendant, the learned judge was correct in giving the defendant the right of hearing in relation to the defendant's application in encl. (9).

F **Interim Mandatory Injunction**

[35] The stand advocated for the defendant is that the court rarely, if ever, grants an *ex parte* mandatory injunction, as shown in:

- G (1) *Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok* [1975] 1 LNS 190 HC;
- (2) *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1978] 1 LNS 184 FC;
- H (3) *Gibb & Co v. Malaysia Building Society Bhd* [1982] CLJ 185; [1982] CLJ (Rep) 99 FC; and
- (4) *Tinta Press Sdn Bhd v. Bank Islam (M) Bhd* [1987] 1 CLJ 447; [1987] CLJ (Rep) 396 FC.
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[36] It was asserted for the plaintiff that the injunction is only partly mandatory and that the authorities cited for the defendant were distinguishable. A

[37] In the instant appeal, we found that para (b) of the injunction contains a mandatory order and merits reproduction as follows: B

(b) If any of the trade fixtures, fittings, plant, machinery, equipment and other removable items are removed, an order that the respondent, its officers, staff, agents, representatives or whosoever are required, and an injunction be granted to compel the respondent, its officers, staff, agents, representatives or whosoever, to return and restore the same pursuant to Clause 6A.1(a) of the Tenancy Agreement. C

[38] It is trite law that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases: per Abdooldader J (later SCJ) in *Wah Loong (Jelapang) Tin Mine, supra*. D

[39] *Wah Loong (Jelapang) Tin Mine, supra*, was approved in *Sivaperuman, supra*, where the Federal Court held *inter alia*, that: E

- (1) The interlocutory injunction, although couched in prohibitory terms was in effect a mandatory injunction in substance and effect; and
- (2) An interim or interlocutory mandatory injunction would never be granted before trial save in exceptional and extremely rare cases. F

[40] In *Gibb & Co., supra*, the Federal Court reaffirmed that an interim or interlocutory mandatory injunction would only issue in proper and appropriate cases. G

[41] *Wah Loong, supra, Sivaperuman, supra, and Gibb & Co, supra*, were further cited with approval by the Supreme Court in *Tinta Press Sdn Bhd, supra*, where Syed Agil Barakbah SCJ delivered the judgment of the court and held that: H

The discretionary power of the Court to grant a mandatory injunction is provided by s. 53 of the Specific Relief Act 1950 (Act 137). By judicial process, the power is extended to the granting of an interlocutory mandatory injunction before trial. Such discretion however must be exercised and an injunction I

- A granted only in exceptional and extremely rare cases. The case must be unusually strong and clear in that the Court must feel assured that a similar injunction would probably be granted at the trial on the ground that it would be just and equitable that the plaintiff's interest would be protected by immediate issue of an injunction, otherwise irreparable injury and inconvenience would result.
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Damages Adequate Remedy

- C [42] The instant appeal arose from a dispute pertaining to a tenancy agreement for the operation of a nightclub, the breach of which would at most give rise to quantifiable damages as an adequate and proper remedy. It is trite law that injunction would not be granted in such cases: see eg, *London & Blackwell Railway Co v. Cross* [1886] 3 Ch. D 354 per Lindley LJ, cited by Hashim Yeop A Sani CJ (M) (as he then was) in *Associated Tractors Sdn Bhd v. Chan Boon Heng & Anor* [1990] 2 CLJ 157; [1990] 1 CLJ (Rep) 30 SC; and *Sivaperuman, supra*.
- D

Conclusion

- E [43] For reasons given above, we are of the view that the court below had correctly, in accordance with established judicial principles, considered the facts and circumstances in the exercise of discretion in setting aside the injunction. We found no merits in the instant appeal. We therefore dismissed it with costs. The decision of the court below is affirmed. Deposit to the defendant on account of taxed costs.
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